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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1986

ELIJAH W. RATCLIFF,
Petitioner

vs.

ROBERT M. McKEEVER, ARTURO A. JACOBS AND THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ELIJAH W. RATCLIFF
Petitioner, Pro Solido

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QUESTIONS PRESENTED

I. Upon a sworn complaint of harassment and civil rights violations committed against Petitioners attributable to one or more Respondents under color of authority of the Internal Revenue Laws, Petitioners were entitled to maintain an action for injunctive relief and equitable compensation (Doc. No. 1, Apx. pp. 2-7).

II. The trial Court abused its discretion in dismissing the complaint below without addressing the request for recusal timely filed and served by Petitioners (Doc. Nos. 1 and 18).

III. Petitioners are entitled to income tax refunds and declarations of the absence of income tax liability for the subject taxable years including 1977 through 1981 and to reasonable compensation for losses arising out of unwarranted harassment activities attributable to Respondents (Doc. Nos. 1, 8, 13 and 18; Apx. pp. 30-40).

IV. The trial Court abused its discretion in dismissing the complaint below without addressing the statutory and constitutional jurisdiction asserted by the complaint of Petitioners (Doc. Nos. 1, 8, 13 and 18; Apx. pp. 2-7 and 30-40).

V. The trial Court unconstitutionally abused its discretion in neglecting to consider elements of fraud in an earlier proceeding wherein the Court failed to furnish Petitioners written or other proper traceable notice of the trial setting and in dismissing such cause of action for want of prosecution when Petitioners' absence was attributable to no fault or culpability on the part of either Petitioner (Doc. Nos. 1, 8, 13 and 18; Apx. pp. 2-7 and 30-40).

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ELIJAH W. RATCLIFF and DUNBAR RESOURCES-LIVINGSTON, INC.

Petitioners

vs.

ROBERT M. McKEEVER, ARTURO A. JACOBS, ETC. ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice, and the Justices of the Supreme Court of the United States

GUIDE TO SPECIAL ABBREVIATIONS USED IN PETITION

REFERENCE	ABBREVIATION
Appendix or Record Excerpts	Apx.
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Paragraph	para.
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Transcript from Below	Tr.
United States District Court Below	US DC or US DC SD TX
United States Court of Appeals for the Fifth Circuit	U.S.C.A., 5th Cir.

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OPINIONS BELOW

Petitioners seek review by the Supreme Court of the United States from a decision by the United States Court of Appeals, Fifth Circuit, No. 86-2213, not reported, a copy of which is appended hereto (or a copy will be appended to the final draft hereof), affirming the erroneous or inadvertant dismissal of Petitioners' cause of action in the United States District Court for the Southern District of Texas, Houston Division, a copy of which is appended hereto (or will be furnished with the final draft hereof).

GROUNDS FOR SUPREME COURT JURISDICTION

The decision of the United States Court of Appeals, Fifth Circuit, No. 86-2213, was rendered and entered on the date of November 25, 1986. Petitioners' motion for rehearing was denied on January 15, 1987.

Review by Appeal herein, or Petition for Writ of Certiorari, is pursuant to Title 28, United States Code, Section 1254, of the lower Courts' failure to exercise jurisdiction granted by United States Code, Const. Art. III and Amend. I, V, VI and XIV; Title 28, United States Code, Sections 1343, 1443 and 1447(d); and Title 42, United States Code, Sections 1981, 1982, 1983 and 1985 as appended hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Constitutional provisions invoked by Petitioners below and giving rise to the relief sought superceding the Anti-Injunction Act and general sovereignty considerations consist of United States Code, Const. Amend. I, V, VI and XIV. Statutory provisions upon which Petitioners rely are Title 28, United States Code, Sections 1331, 1332, 1343, 1346(a)(1), 1443, 1446, 1447(d) and 1651 and Title 42, United States Code, Sections 1981, 1982, 1983 and 1985, authorizing compensation and injunctive relief; and Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C., authorizing rectification of fraud perpetrated in and upon the Courts below. Copies of the noted authorities are submitted in the appendix herewith.

STATEMENT OF THE CASE

The action in the United States District Court below was initiated to curtail infringements upon the civil and Constitutional rights of Petitioners. Title 18, United States Code, Sections 241, 242 and 245(b)(4)(B) and (5); Title 26, United States Code, Sections 7213 and 7214.

Respondents levied upon and collected accumulated assets of Petitioners under color of authority of tax deficiencies without setting forth any coherent contest or accounting purporting to refute the returns and calculations filed by Petitioners for the subject taxable years. Title 26, United States Code, Section 1(c), 15(a), 162(a), 165(a), 167(a), 172(a), 1374(a), 6012(a)(1) and (2) and 6072.

Petitioners contended originally that the activities attributable to Respondents infringed upon United States Code, Const. Amend. V and XIV and requested a jury trial as mandated by United States Code, Const. Amend. VI, consistent with the precedents set in *Miller v. Standard Nut Margarine Co. of Florida,* 284 U.S. 498 (1932), and *National Foundry Co. of New York v. Director of Internal Revenue,* 229 F.2d 149 (2nd Cir. 1956).

However, the refusal of the United States District Court below to entertain Petitioners' pleadings infringed further upon their rights under the First Amendment as an attorney admitted to practice before the Courts of the State of Texas on September 17, 1962 and the United States District Court for the Southern District of Texas in June of 1966, and a corporate entity organized by such attorney, who has not been Constitutionally removed from such attorney status. United States Code, Const. Amend. I; *Stevens v. Gertz,* 103 F. Supp. 760 (W.D. Mich., N.D. 1952); *Lefton v. Hattiesburg,* 333 F.2d 280 (5th Cir. 1964); *Sanders v. Russel,* 401 F.2d 241 (5th Cir. 1968).

ARGUMENT

No lack of clarity has been exhibited in the facts showing that Petitioner, Pro Solido, had no income tax liability for the taxable years preceding 1978 (No. 84-2328, U.S.C.A., 5th Cir. SF P. 30, lines 6-9 and 15-16), and similar facts can substantiate the absence of any liability on his part for the taxable years 1978 through 1981 as well as reduced or alleviated tax liability of similarly situated Taxpayers. Thus, jurisdiction of the District Court below was duly invoked under Title 28, United States Code, Sections 1346(a)(1) and (b), ancillary and secondary to jurisdiction of the claim against bureaucratic employees for violations of Petitioners' civil rights under standards of Title 18, United States Code, Sections 241, 242 and 245(b)(4)(B) and (5); Title 28, United States Code, Section 1343; Title 42, United States Code, Sections 1981, 1982, 1983 and 1985; and United States Code Const. Amend. I, IV, V, VI, VIII and XIV, related to the arbitrary, capricious and unreasonable character and extent of the tactics utilized by bureaucratic personnel and cooperatives contravening the rights of Petitioners.

I. Upon a Sworn Complaint of Harassment and Civil Rights Violations Committed Against Petitioners Attributable to One or More Respondents Under Color of Authority of the Internal Revenue Laws, Petitioners Are Entitled To Maintain an Action for Injunctive Relief and Equitable Compensation

The Complaint in the United States District Court below was duly filed (Doc. No. 1; Apx. p. 3) including multiple claims for relief, emphasizing injunctive relief and equitable compen-

sation, CA No. H-85-2490. Fed. Rules Civ. Proc., Rules 7 and 8(a) and (e), 28 U.S.C.; *Sanders v. Russel,* 401 F.2d 241 (5th Cir. 1968).

The action relied upon the protections of United States Code, Const. Amend V and XIV, as Petitioners had detected a plural effort in the subject geographical area to circumvent the preclusions of Title 18, United States Code, Sections 241, 242 and 245(b)(4)(B) and (5), and Title 42, United States Code, Sections 1981, 1982, 1983 and 1985, by disguising their conduct as under the Internal Revenue laws.

The exactions and encumbrances attributable to Respondents had no basis in rational accounting, and no calculation or determination has ever been furnished Petitioners purporting to traverse the income tax returns, schedules and calculations as duly filed by Petitioners for the taxable years alluded to by Respondents in conjunction with the subject extractions, encumbrances and harassment activities. Title 26, United States Code, Sections 151(a), 162(a), 165(a), 167(a), 172(a) and 1374(a). *Miller v. Standard Nut Margarine Co. of Florida,* 284 U.S. 498 (1932). Thus, it follows that the Complaint was sufficient, notwithstanding the Anti-Injunction Act, for it is elementary that legislation cannot be applied in a manner contravening Constitutional standards. United States Code, Const. Amend. V and XIV; *South Carolina v. Regan,* 465 U.S. 367 (1984).

Petitioners have clearly pleaded and adduced evidence establishing that they incurred net income tax liability for each of the taxable years in controversy so there is no theory by which Respondents, or each of them, could prevail on the merits (Doc. No. 1, Apx. pp. 2-7; Doc. No. 8, Apx. pp. 28-40), and the misconduct attributable to Respondents has reduced Petitioners' assets and credit to a level such that the amount of the alleged liability cannot be tendered, jointly or severally. *Sanders v. Russel,* 401 F.2d 241 (5th Cir. 1968).

Argument

The Complaint is not for a declaratory judgment with respect to the United States of America, but it sets forth that during a time frame described, while Petitioners were preoccupied with maintaining certain business interests as law-abiding citizens, one or more Respondents, and persons whose conduct was attributable to one or more Respondents, embarked upon a course to (1) harass Petitioners with petty allegations of income tax liability; (2) expand their efforts by encumbering Petitioners' accounts and property with liens and proposed levies intended to render normal business operations ineffective; and (3) to defame, discredit and otherwise incriminate Petitioners, thereby negating their chances for recovery and resumption of progressively successful income producing operations, which misconduct substantially injured Petitioners giving rise to the relief sought below (Doc. No. 1).

II. The Trial Court Abused Its Discretion in Dismissing the Complaint Herein Without Addressing the Request for Recusal Timely Filed and Served by Petitioners

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Judge Carl O. Bue, Jr., presiding in the United States District Court for the Southern District of Texas below, was assigned a Civil Rights removal action filed by Petitioner Ratcliff docketed as Cr. No. 71-H-228, involving a fraudulently fabricated charge of theft against such Petitioner in the District Court of Polk County, Texas, No. 9432, wherein he was denied a Grand Jury of his peers among other elements of a conspiracy to deny him a fair and impartial trial under the Constitution and laws of the United States, with respect to which timely objections and motions were presented in all the particulars.

The described Presiding Judge, Carl O. Bue, Jr., was influenced through political considerations to remand the subject removal action to the State District Court where the unconsti-

tutional deprivations complained of were climaxed. Fed. Rules Evid. Rule 201(d), 28 U.S.C.

After Petitioner Ratcliff was able to develop the adverse factual situation, including a review by the U.S. Department of the Treasury in a 1982 Complaint, the Honorable Mark White, Governor of the State of Texas, granted Petitioner Ratcliff a full pardon and restoration of civil rights based on the "fraudulently fabricated" nature of the pertinent void conviction.

Such litigation has been extensively entertained in the United States District Court for the Southern District of Texas, Houston Division, related to the rights of Petitioners, as an attorney and his clients, under the First Amendment to the United States Constitution. Thus, upon the assignment of the instant action to Judge Bue's docket as CA No. H-85-2490, involving similar First Amendment issues, Petitioners timely moved for judicial disqualification. United States Code, Const. Amend. I; Title 28, United States Code, Section 455.

In spite of being advised in the premises and knowledgeable about his own personal interests arising out of unconstitutional infringements on the rights of the Petitioner in the earlier removal action comprising a substantial conflict of interest in presiding over the latter suit for injunctive relief and equitable compensation, seeking to rectify the wrongful taking of property belonging to Petitioners and their business associates and coventurers without due process or the equal protection of the laws by parties influenced to seek incrimination of the full pardon and restoration of civil rights granted Petitioner by the Governor of the State of Texas, such Presiding Judge declined to recuse himself below effectuating an abuse of the Constitutional rights of Petitioners. United States Code, Const. Amend. I, V and XIV.

The accumulated compilations and disseminations of data by Respondents giving rise to the contested tax claims and defamation herein relate clearly to exactions and encumbrances by

individuals acting under color of authority of the United States of America designed and calculated to disrupt Petitioners' legitimate business endeavors. The claims, levies and liens executed by employees of Respondents suggesting tax liabilities on the part of the individual Petitioner and disregarding the tax consequences of the corporate Petitioner cannot be justified or established to prevail on the merits, and Petitioners are confronting irreparable harm by the described endeavors. *Miller v. Standard Nut Margarine Co. of Florida,* 284 U.S 498 (1932); *National Foundry Co. of New York v. Director of Internal Revenue,* 229 F.2d 149 (2nd Cir. 1956). (Doc. No. 1, Apx. pp. 2-7) should be observed to support this point.

Petitioners' assertions of wrongful conduct herein do not purport to suggest or trace illegal action at the highest levels of the United States Government, but the pertinent wrongful conduct entails bureaucrats too numerous to decipher without formal exhaustive discovery, and who all appear to be within, or acting in response to, fabrications from the geographical realm of the named district directors, Respondents Robert M. McKeever and Arturo A. Jacobs (Doc. No. 1).

The resulting procedures attributable to Respondents are calculated to involve the individual Petitioner and his co-venturers in multiple refund suits, which could have been simply resolved below, and to illegally impair homestead interests of his co-tenants and joint venturers (Doc. Nos. 1, 8 and 13; Apx. pp. 30-40). Also, subsequent to and by virtue of the filing of *Ratcliff v. United States,* CA No. H-82-0620, and CA No. H-84-4973, US DC SD TX, Houston Division, additional revenues and valuables of Petitioners have been collected and encumbered and further claims for compensation have ripened under Section 7422 of the Internal Revenue Code, and a civil action claim for refund of taxes excessively collected is properly secondary and ancillary to an action to redress and enjoin further excessive and improper conduct in violation of Petitioners' civil rights. Fed. Rules Civ. Proc., Rule 8(a) and (e), 28 U.S.C.;

Title 26, United States Code, Section 7422; Title 28, United States Code, Sections 1343 and 1346(a)(1).

The subject litigation is not abusive on the part of Petitioners merely because certain elements of it are repetitious. Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C. The other elements of the pleadings and action appertain to remedial efforts relevant to Governmental and associated abuses subsequent to the earlier pleadings, and the substantive issues of the cause of action have not been developed and addressed by any Court under the general statutes and laws or Rule 60(b).

Respondents' motion to dismiss filed below in the United States District Court (Doc. Nos. 9 and 10) is, furthermore, inapplicable to the case because the admissions on file by operation of Rule 36 of the Federal Rules of Civil Procedure establish the jurisdiction of such Court below, and the contents of such admissions are not refuted (Apx. pp. 30-40). Fed. Rules Civ. Proc., Rules 33 and 36, 28 U.S.C.; *Oroco Marine, Inc. v. National Marine Service, Inc.*, 71 F.R.D. 220 (S.D. Tex. 1976).

Thus, Petitioners' Request for Recusal (Doc. No. 18) should not have been disregarded by such United States District Court's pretrial order (Doc. No. 24) since the Complaint (Doc. No. 1) plainly set forth facts upon which legal relief should have been granted, and the proof adduced below indicates substantial personal interest on the part of the Presiding Judge to push the case to a conclusion negative to Petitioners' interests. Fed. Rules Civ. Proc., Rule 12, 28 U.S.C.; Title 28, United States Code, Section 455; *Conley v. Gibson*, 355 U.S. 41 (1957); *Adams v. United States*, 302 F.2d 307 (5th Cir. 1962); *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986).

A judgment denying a Constitutional right is subject to collateral attack, and such a judgment reached without due process is void. 46 Am. Jur. 2d Judgments §§380 and 642; *Bass v. Hoagland*, 172 F.2d 205 (5th Cir. 1949), certiorari denied

338 U.S. 816; *Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc.*, 740 F.2d 1499 (11th Cir. 1984).

III. Petitioners Are Entitled to Income Tax Refunds and Declarations of the Absence of Income Tax Liability for the Subject Taxable Years 1977 Through 1981 and to Reasonable Compensation for Losses Arising Out of Unwarranted Harassment Activities Attributable to Respondents

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Consistent with the requirements of Title 26, United States Code, Section 6012(a)(1) and (2), Petitioners timely filed applicable forms 1040 and 1120 S for each of the taxable years 1977 through 1981 (Doc. No. 1; No. 84-2328, U.S.C.A., 5th Cir. Doc. No. 1, Apx. pp. 16-24 and 25-32). Certain parties purporting to act pursuant to the Internal Revenue laws engaged a harassment campaign against Petitioners and declined to allow certain clearly indicated income tax refunds and credits and even initiated and accumulated defamatory and libelous files negatively affecting the credit of Petitioners (*Ibid.*, Apx. pp. 7-11 and 34; also, Doc. No. 1, Apx. pp. 2-10). Nevertheless, the trial Court wrongfully and unconstitutionally dismissed the actions for want of prosecution, initially, and on grounds of res judicata, most recently, and the merits of the Petitioners' claims have not been entertained (Doc. No. 1). Title 28, United States Code, Sections 1331, 1332, 1343, 1346(a)(1) and 1447(d); Title 42, United States Code, Sections 1981, 1982, 1983 and 1985; United States Code, Const. Amend. I, V, VI, VIII and XIV.

Even though the corporate Petitioner, as a subchapter S entity, did not have direct responsibility for any current income taxes, its cause of action lies in defamation and libel via the accumulation of negative data from which credit analyses evolve, and ancillary jurisdiction attaches through Title 15, United States Code, Sections 1612(a) and 1681-1681t; in con-

junction with Title 28, United States Code, Sections 1343 and 1346, and Title 42, United States Code, Sections 1981, 1982, 1983 and 1985(2) and (3); *Kizas v. Webster*, 532 F. Supp. 1331 (D.C. D.C. 1982).

IV. The Trial Court Abused Its Discretion in Dismissing the Complaint Without Addressing the Statutory and Constitutional Jurisdiction Asserted Below by Petitioners

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Petitioner Dunbar Resources-Livingston, Inc., is a Texas corporation which timely filed an election to be treated as a subchapter S corporation (No. 84-2328, U.S.C.A., 5th Cir., Doc. No. 1, para. II, SF p. 30, lines 6-7, 7-8 and 15-16). Title 26, United States Code, Sections 1371-1379, inclusive. Such subchapter S status has not been contested, but its promoters and officials had experiences with similar entities which were denied subchapter S status without due process of law. Thus, as a protective element, it joined herein as a party to avoid an unfavorable adjudication that could be incurred. Fed. Rules Civ. Proc., Rules 3, 4, 6, 7 and 8, 28 U.S.C.; Title 26, United States Code, Section 172; Title 28, United States Code, Section 1346.

The primary justification for joining the corporate Petitioner to this action, however, was to redress and curtail injuries arising out of abuses of the Internal Revenue laws under the guise of collecting legitimate Federal taxes (*Ibid*. Doc. No. 1, para. IV(2)). Fed. Rules Civ. Proc., Rules 18 and 19, 28 U.S.C.; Title 28, United States Code, Sections 1343 and 1346.

Respondent Robert M. McKeever was the District Director of the Internal Revenue Service for the District encompassing the residence of the corporate Petitioner herein at the time the original claims arose (No. 84-2328, U.S.C.A., 5th Cir., Doc. No. 1). He was made a party because the misconduct of his

subordinates, previously brought to his attention, clearly contravened the Constitutional and statutory policies effective during the controlling interim as well as the letter of case precedents. Title 15, United States Code, Sections 1681-1681(t), inclusive; Title 42, United States Code, Sections 1981, 1982, 1983 and 1985; United States Code, Const. Amend. I and V; *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976).

Taxpayers J. W. and Clairette W. Ratcliff and Melvin D. and Ruth R. Houston became parties to the earlier proceeding litigated herein by duly and timely filing intervenors' original petitions in the United States District Court below (*Ibid.*, Apx. pp. 16-24 and 25-32). Fed. Rules Civ. Proc., Rules 20 and 24(a)(2), 28 U.S.C. No order dismissing either petition was entered, and they were not notified of the trial setting while the Court refrained from addressing their petitions in any direct manner except to deny a motion for new trial and request for findings of fact and conclusions of law submitted by certain intervening parties therein. (*Ibid.*, Doc. Nos. 52 and 53). Fed. Rules Civ. Proc., Rule 59(a), 28 U.S.C.

The described intervening parties were shareholders in subchapter S corporations managed by Petitioners, and, thus, were entitled to intervene to enhance their protection with respect to a contemplated judgment (*Ibid.*, Doc. No. 1, Apx. pp. 16-24 and 25-32). Fed. Rules Civ. Proc., Rule 24(a)(2), 28 U.S.C.; *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285 (D.C. Cir. 1980).

V. The Trial Court Unconstitutionally Abused Its Discretion in Neglecting To Consider Elements of Fraud in an Earlier Proceeding Wherein the Court Failed To Furnish Petitioners Written or Other Proper and Traceable Notice of the Trial Setting and in Dismissing the Cause of Action for Want of Prosecution When Petitioners' Absence Was Attributable to no Fault or Culpability on the Part of Either Petitioner

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Contrary to the standard procedure utilized by Judges of the United States District Court below, the selection of a trial date was not made a part of the pretrial order below (*Ibid.*, Doc. No. omitted/5-9-83). U.S. D.C. S.D. TX. Local Rule 6. Further, contrary to due process standards, no written or other verifiable notice of the trial setting was furnished Petitioners. *Sorenson v. Secretary of the Treasury of the United States*, 557 F. Supp. 729 (W.D. Wash. 1982).

In the immediate fact situation, the Presiding Judge insufficiently relied on a clerical employee's telephone call to the office of Petitioner, Pro Solido, which call was significantly prior to the setting date described, and it appeared less than legitimate because adequate time remained to accomplish written notification. Thus, the message was not relayed to the other Taxpayers immediately, as a more formal context would have produced. *Vaughn v. Franzen*, 549 F. Supp. 426 (N.D. Ill., E.D. 1982).

According to the evidence at the hearing on the motion for new trial filed by Petitioner, Pro Solido, the cause was called for trial by the Deputy Clerk, and when Appellants, including Petitioners, failed to appear, such cause was dismissed for want of prosecution (*Ibid.*, Doc. Nos. 42 and 43).

However, such disposition failed to properly take into account any of the factors justifying the absences, even though such matters had been brought to the attention of the Court

below (*Ibid.*, SF p. 13, lines 13-15 and 17-24; p. 14, lines 1-4, and 24-25; and p. 15, lines 1-3).

This Court of Appeals below was requested, as is the Supreme Court of the United States, to take judicial notice of Fifth Circuit Docket No. 84-2125, wherein Petitioner, Pro Solido, sought a writ of mandamus compelling the Clerk of the United States District Court and the United States Marshal for the Southern District of Texas to rectify a directive communicated on March 1, 1984, prohibiting such Petitioner's appearance at the Federal Building and United States Courthouse in Houston, Texas. Fed. Rules Evid. Rule 201(d), 28 U.S.C.

In addition to the described petition for writ of mandamus effort, Petitioner, Pro Solido, called the Presiding Judge therein to explain the dilemma and requested a return call from the Judge's Office or the United States Marshal's Office verifying that the directive had been relinquished within the actual knowledge of the United States Marshal's Office, since an employee of that Office had threatened to arrest the Petitioner if he returned to the subject premises (*Ibid.*, SF p. 13, lines 13-15, and 17-20). No requested confirmation was received at either office of Petitioners so no appearance was made at the Federal premises (*Ibid.*, SF p. 14, lines 1-4 and 24-25, and p. 15, lines 1-3).

The unavailability of Petitioners at such setting, attributable to no fault or culpability of their own, did not justify dismissal of the action on its merits for want of prosecution. Fed. Rules Civ. Proc., Rule 41, 28 U.S.C.; *Reizakis v. Loy,* 490 F.2d 1132 (4th Cir. 1974).

If a written notification of the trial setting had been furnished Petitioners, or either of them, they would have possessed some semblance of authority which a Deputy United States Marshal might respect, presumptively, and an appearance at the Courthouse contrary to his oral order could have been absolved. Thus, the explained absence of Petitioners

under the facts did not warrant dismissal sanctions with prejudice. *McGowan v. Faulkner Concrete Pipe Company,* 659 F.2d 544 (5th Cir. 1981).

The Supreme Court is requested to note, also, that Petitioner, Pro Solido, along with the other Taxpayers concerned with similar issues below, has prosecuted his cause of action with diligence at all stages. A proposed pretrial order was duly submitted, and at least two witnesses were contemplated to bolster his personal testimony *(Ibid.,* Doc. No. 30, Apx. pp. 7-12). If a delay had been desired, it would have been routine to file a motion for continuance since no continuance had been previously sought by Petitioners, but they wished for the action to proceed timely and even rapidly, consistent with due process. It is clear, therefore, that the dismissal of the action because of insufficiencies in magisterial procedures and applications by the officials below contravenes due process under the Fifth Amendment. United States Code, Const. Amend. I, V and XIV; Title 42, United States Code, Sections 1981, 1982, 1983 and 1985(2) and (3); *Council of Federated Organizations v. Mize,* 339 F.2d 898 (5th Cir. 1964); *Holt v. Pitts,* 619 F.2d 558 (6th Cir. 1980); *Jerry v. Francisco,* 632 F.2d 252 (3rd Cir. 1980); *Johnson v. Boyd-Richardson Company,* 659 F.2d 147 (8th Cir. 1981).

CONCLUSION

The decision of the United States Court of Appeals, Fifth Circuit, No. 86-2213, affirming the dismissal of Petitioners' Complaint in the United States District Court for the Southern District of Texas, Houston Division, No. 86-2490, should be reversed and rendered based upon the admissions, affidavit and other evidence adduced in conjunction with the proceedings described including the Motion for Default and Summary Judgment (Doc. Nos. 8, 13 and 16, Apx. pp. 30-40 and 49-67). Alternatively, the matter should be remanded for a trial honoring due process. The Supreme Court should, furthermore, consistent with *Osborn v. United States,* 22 U.S. (9 Wheat.) 738 (1824), mandate and grant Petitioners' recovery of their reasonable expenses, attorney fees and costs herein to the present time, forthwith, and mandate the United States District Court below to effect a return and reinstatement of any and all monies, property and valuables belonging to Petitioners herein which have been wrongfully collected, seized or levied upon attributable to Respondents' unconstitutional misconduct during the pendency of this litigation and to refrain from any further similar collecting, seizing or levying efforts and procedures with respect to Petitioners until a plenary hearing regarding the issues is set and properly entertained, and a United States District Court Order giving Constitutional regard for due process is entered and duly served in the premises.

s/ELIJAH W. RATCLIFF
FCI # 26215-079
Petitioner, Pro Solido

Date: January 21, 1987

CERTIFICATE OF SERVICE

Elijah W. Ratcliff, Petitioner, Pro Solido, certifies under penalties of perjury as if executed before a proper notary public that a copy of the foregoing Petition for Writ of Certiorari with Appendix in triplicate on Counsel for Respondent appearing herein below by first class United States Mail this 27th day of February, A.D., 1987, addressed to:

Hon. Michael L. Paup
Attorney, Tax Division
U.S. Department of Justice
P.O. Box 502
Washington, D.C. 20544

Hon. Rex E. Lee
Solicitor General of the
U.S. Department of Justice
Tenth Street & Constitution Ave.
Washington, D.C. 20530

s/ELIJAH W. RATCLIFF
Petitioner, Pro Solido

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-85-2490

ELIJAH W. RATCLIFF, et al.
v.
ROBERT M. McKEEVER, et al.

JUDGMENT

On March 31, 1986 came on to be heard Defendant, United States of America's Motion to Dismiss Pursuant to Rule 12(b)(6). After prudent consideration of the contentions of the parties, the briefs submitted, and the applicable law, the Court is of the opinion that the Defendant's Motion to Dismiss should be granted.

This is a Final Judgment.

SIGNED AND ENTERED at Houston, Texas, on this the 17th day of April, 1986.

s/CARL O. BUE, JR.
United States District Judge

Judgment, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2213
Summary Calendar

ELIJAH W. RATCLIFF, and
DUNBAR RESOURCES-LIVINGSTON, INC.,
Plaintiffs-Appellants

versus

ROBERT M. McKEEVER,
ARTURO A. JACOBS, ETC., ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas

(NOVEMBER 25, 1986)

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

PER CURIAM:*

Elijah W. Ratcliff, appellant, brought suit on behalf of himself and Dunbar Resources-Livingston, Inc. (Dunbar), a "Subchapter S" corporation closely related to Ratcliff, to seek a refund of federal income taxes paid by himself and Dunbar for the years 1977 through 1981. Ratcliff also seeks damages,

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

declaratory and injunctive relief.[1] The district court dismissed the suit for failure to state a claim on which relief can be granted. We affirm.

I.

This is not the first time that Mr. Ratcliff has undertaken to enlist the aid of the United States Courts in his dispute with the Internal Revenue Service. In 1981, Ratcliff was assessed a deficiency of $704.23 for the 1977 tax year because he had improperly claimed various business deductions, including a deduction for a loss attributable to Dunbar. The improper deductions were taken for what Ratcliff termed "loss of anticipated income": Ratcliff would anticipate making a particular sum of money on a transaction; if he did not actually make that amount, he would deduct the difference between his real profit and his expected profit as a loss.

Ratcliff paid the deficiency, requested a refund, and sued when his request was denied. After dismissing all parties except the United States and Ratcliff, the district court dismissed the case for failure to prosecute. Ratcliff filed a motion for new trial, which was denied. He appealed, and the district court's actions were affirmed. *Ratcliff v. McKeever*, No. 84-2328 (5th Cir. October 18, 1984) (unpublished).

In 1984, Ratcliff was assessed a deficiencey of $48,983.73 for taxes due from 1978 through 1981. A lien was placed on one of his bank accounts to satisfy the deficiency. Ratcliff filed suit to have the lien removed. His prayer for relief included a request for a judgment removing the lien and "for a refund of income taxes excessively paid [sic] or collected for the pertinent periods and accounts." This suit was dismissed, and Ratcliff filed no appeal. Instead, Ratcliff filed this suit disputing the

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[1] This opinion will refer to "appellant," in the singular, although there is some question as to whether Ratcliff is appealing alone or with Dunbar. Because the case was properly dismissed, the issue is moot.

same deficiency by contesting another lien placed on a different piece of property.

On the government's motion, the district court dismissed this suit, and appellant filed a timely notice of appeal.

II.

A complaint should be dismissed for failure to state a claim only "if appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983) (quoting *Conley v. Gobson,* 355 U.S. 41, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957)). Here, Ratcliff's suit is barred by the Anti-Injunction Act, 26 U.S.C. §7421, and therefore he is not entitled to relief even if his allegations are taken as true.

The Anti-Injunction Act bars, with certain exceptions, any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C.A. §7421(a) (Supp. 1986). The instant suit, in which appellant asks for equitable relief, falls within this prohibition. Further, appellant cannot make use of the statutory exception provided by 26 U.S.C. §7426(a) for relief from the imposition of a wrongful levy, because the exception is available only to persons "other than the person against whom is assessed the tax out of which such levy arose." 26 U.S.C.A. §7426(a)(1) (1967 & Supp. 1986). Appellant is the person against whom the taxes were assessed. Dunbar, however, is a third party with an alleged interest in the property, and therefore is not precluded by that language from using §7426(a). Nevertheless, Dunbar's challenge must also fail because it is based only upon the argument that the underlying tax assessment was incorrect. §7426(c) provides that, for the purpose of the exception in §7426(a), the underlying assessment shall be conclusively presumed to be valid; even a third party, therefore, cannot attack a levy on the grounds that the underlying assessment was wrong.

Neither can appellant make use of the judicially-created exception to the Anti-Injunction Act. In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 82 S.Ct. 1579 (1962), the Supreme Court determined that a taxpayer could maintain a suit to restrain the collection of taxes, the Anti-Injunction Act notwithstanding, if the taxpayer (1) was certain to succeed on the merits, and (2) could demonstrate that collection would cause him irreparable harm. *Id.* at 1129; *see also South Carolina v. Regan*, 465 U.S. 367, 104 S.Ct. 1107, 1112, 79 L.Ed. 2d 372 (1984). Appellant is not certain to win on the merits; in fact, it is impossible to detect from the pleadings and briefs exactly why he claims the taxes were improperly assessed. Neither has appellant demonstrated or even alleged that he will be irreparably harmed. Appellant's suit, to the extent it seeks injunctive or other equitable relief, thus falls within the class of suits proscribed by the Anti-Injunction Act. We affirm the dismissal.

III.

Appellant's complaint is subject to the possible interpretation that it is a claim for a refund. *See Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) (holding that a pro se plaintiff's pleadings must be given a liberal construction). But a claim for a refund can only be brought after the taxpayer has paid the full amount of the assessed deficiency. 26 U.S.C. §7422(a). Appellant has not alleged that the deficiencies for the years 1978 through 1981 have been paid. In fact, the existence of the levy shows that they have not been paid. Thus, the suit for a refund of the taxes paid for those years cannot be maintained.

Appellant did pay the entire tax deficiency for the year 1977. However, his suit for a refund for that tax year has already been litigated, *see Ratcliff v. McKeever*, No. 84-2328 (5th Cir. October 18, 1984) (unpublished), and is res judicata.

IV.

Because appellant's suit is unauthorized under the controlling statutes and is barred for the year 1977 as res judicata, we do not reach appellee's argument that appellant's entire suit is res judicata. Nor do we consider whether the naming of the two regional directors of the Internal Revenue Service as defendants was improper, nor whether appellant Ratcliff, not a licensed attorney, is qualified to represent Dunbar.

AFFIRMED.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED:

Constitutional Provisions Involved:

United States Code, Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, [sic] when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Code, Const. Amend. XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved:

Title 18, United States Code, Section 1505:

Obstruction of proceedings before departments, agencies, and committees.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House or any joint committee of the Congress—

Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770; Sept. 19, 1962, Pub.L. 87-664, §6(a), 76 Stat. 551.

Title 26, United States Code, Section 1(c):

Unmarried individuals (other than surviving spouses and heads of households).

There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b) who is not a married individual (as defined in section 143) a tax determined in accordance with the following table:

If the taxable income is Not over $500 - - - - - - - - - The tax is: 14% of the taxable income . . .

Title 26, United States Code, Section 151(a):

Allowance of deductions.

In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

Title 26, United States Code, Section 162(a);

Trade or business expenses. In general.

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—. . .

Title 26, United States Code, Section 165(a):

Losses. General rule.

There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

Title 26, United States Code, Section 167(a):

Depreciation. General rule.

There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in a trade or business, or
(2) of property held for the production of income.

Title 26, United States Code, Section 172(a):

Net operating loss deduction. Deduction allowed.

There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

Title 26, United States Code, Section 1374(a):

Corporation net operating loss allowed to shareholders. General Rule.

A net operating loss of an electing small business corporation for any taxable year shall be allowed as a deduction from

gross income of the shareholders of such corporation in the manner and to the extent set forth in this section.

Title 26, United States Code, Section 7212(a):

Attempts to interfere with administration of internal revenue laws. Corrupt or forcible interference.

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

Title 28, United States Code, Section 1343:

Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in sec-

tion 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, Sec. 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, Sec. 121, 71 Stat. 637.

Title 28, United States Code, Section 1443:

Civil rights cases.

Any of the following civil actions or criminal prosecutions commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending;

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the grounds that it would be inconsistent with such law. (June 25, 1948, ch. 645, Section 1, 62 Stat. 938).

Title 28, United States Code, Section 1447(d):

Procedure after removal generally.

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except

that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. June 25, 1948, c. 646, Sec. 1, 62 Stat. 939; May 24, 1949, c. 139, Sec. 84, 63 Stat. 102; July 2, 1964, P.L. 88-352, Title IX, Sec. 901, 78 Stat. 266.

Title 28, United States Code, Section 1651(a):

Writs.

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, Sec. 90, 63 Stat. 102.

Title 42, United States Code, Section 1981:

Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like purnishment, [sic] pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. 1977.

Title 42, United States Code, Section 1982:

Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (R.S. Sec. 1978).

Title 42, United States Code, Section 1983:

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. Sec. 1979).

Title 42, United States Code, Section 1985:

Conspiracy to interfere with civil rights.

(1) Preventing officer from performing duties.

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such juror in his person or property on account of his having so attended or testified, or to influence

the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such party or witness in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege, of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators. R.S. Sec. 1980.

Regulations Involved:

Fed. Rules Cr. Proc., Rule 15(a), 18 U.S.C.

Depositions. When Taken.

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that trestimony [sic] of such witness taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

Fed. Rules Cr. Proc., Rule 16(a)(1)(A), 18 U.S.C.

Disclosure of Evidence by the Government. Information Subject to Disclosure. Statement of Defendant.

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery

of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

Fed. Rules Cr. Proc., Rule 21(a), 18 U.S.C.

Transfer from the District for Trial. For Prejudice in the District.

The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district. As amended Feb. 28, 1966, eff. July 1, 1966.

Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C.

Relief from Judgment or Order. Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrisic [sic] or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satis-

fied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or other proceeding was entered or taken. A motion under this subdivision (b) does not have the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nomis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 86-2213

Filed January 12, 1987

ELIJAH W. RATCLIFF, and
DUNBAR RESOURCES-LIVINGSTON, INC.,
Appellants

vs.

ROBERT M. McKEEVER, ARTURO A. JACOBS
AND THE UNITED STATES OF AMERICA,
Appellees

NOTICE OF APPEAL

TO THE HONORABLE CHARLES CLARK, CHIEF JUDGE, AND THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

PLEASE TAKE NOTICE that Elijah W. Ratcliff and Dunbar Resources-Livingston, Inc., Appellants, hereby, initiate an Appeal from the decision of this Court rendered under date of November 25, 1986, and the refusal to grant a rehearing as requested by Appellants, through the present date, to the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1254, and under United States Code, Const. Art. III and Amend. I, V and XIV, as illuminated by the record including the Brief of Appellants and the Reply to Brief for the Appellees filed herein.

Respectfully submitted this 5th day of January, A.D., 1987.

s/ELIJAH W. RATCLIFF
Appellant, Pro Solido
FCI # 26215-079

AFFIDAVIT OF SERVICE

Appellant, Pro Solido, certifies under penalties of perjury as if executed before a proper notary public that a copy of the foregoing Notice of Appeal was served on Appellees herein by first class United States Mail this 5th day of January, A.D., 1987, addressed to:

Hon. Michael L. Paup
Chief, Appellate Section
Tax Division
U.S. Department of Justice
P.O. Box 502
Washington, D.C. 20544

Hon. Robert M. McKeever
300 [Illegible] Street
Austin, Texas 78702

and

Hon. Arturo A. Jacobs
3223 Briarpark
Houston, Texas 77042

s/ELIJAH W. RATCLIFF
Appellant, Pro Solido